

1993

# Pipe Specialty, Inc. v. Industrial Commission of Utah : Brief of Respondent

Utah Court of Appeals

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Alan L. Hennebold; Sharon Eblen; Attorneys for Respondent.

James J. Lund; Attorney for Petitioner.

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UTAH COURT OF APPEALS

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930353

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IN THE UTAH COURT OF APPEALS

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PIPE SPECIALTY, INC.,  
(A Utah Corporation)

Petitioner,

vs.

INDUSTRIAL COMMISSION OF  
UTAH, and SALVADORE MONTOYA,

Respondents.

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APPELLATE CASE NO: 930353-CA

PRIORITY NO. 7

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BRIEF OF RESPONDENT INDUSTRIAL COMMISSION OF UTAH

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**FILED**

Utah Court of Appeals

MAR 28 1994

  
Mary T. Noonan  
Clerk of the Court

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COURT OF APPEALS  
STATE OF UTAH

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PIPE SPECIALTY, INC.,  
(A Utah Corporation)

Petitioner,

vs.

INDUSTRIAL COMMISSION OF  
UTAH, and SALVADORE MONTOKA,

Respondents.

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\* BRIEF OF RESPONDENT INDUSTRIAL  
\* COMMISSION OF UTAH  
\*  
\* APPELLATE CASE NO: 930353-CA  
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\* PRIORITY NO. 7  
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PETITION FOR REVIEW FROM THE INDUSTRIAL COMMISSION OF UTAH

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JURISDICTION

Utah Code Ann. §78-2a-3(2)(a), Utah Code Ann. §35-1-86 and Utah Code Ann. §63-46b-16(1) grant the Utah Court of Appeals jurisdiction over Pipe Specialty's Petition For Review.

STATEMENT OF ISSUES AND STANDARDS OF APPELLATE REVIEW

1. In light of Pipe Specialty's untimely Motion For Review to the Commission, does the Court have jurisdiction to consider the merits of Pipe Specialty's Petition For Review? The Court has plenary authority over this purely legal issue. Silva v. Department of Employment Security, 786 P.2d 246, 247 (Utah App. 1990).

2. Did the Commission err in denying Pipe Specialty's request for relief from default? Through the interplay of Utah Code Ann. 63-46b-11(3)(c) and Rules 55(c) and 60(b) of the Utah Rules of Civil Procedure, the Commission is granted discretion to determine whether a party's default should be set aside. Such a determination should therefore be reviewed under a "reasonableness and rationality" standard pursuant to Utah Code Ann. §63-46b-16(4)(h)(i). King v. Industrial Commission, 850 P.2d 1281 (Utah App. 1993).

3. Does the record support the ALJ and Commission's award of medical expenses and compensation to Mr. Montoya. The Commission's determinations of fact are reviewed pursuant to Utah Code Ann. §63-46b-16(4)(g) under the "substantial evidence" standard. King v. Industrial. Commission, Ibid.

#### **APPLICABLE PROVISIONS OF STATUTE AND RULE**

##### **STATUTES**

##### **Utah Code Ann. §35-1-45 (1988)**

Each employee mentioned in Section 35-1-43 who is injured and the dependents of each such employee who is killed, by accident arising out of and in the course of his employment, wherever such injury occurred, if the accident was not purposely self-inflicted, shall be paid compensation for loss sustained on account of the injury or death, and such amount for medical, nurse, and hospital services and medicines, and, in case of death, such amount of funeral expenses, as provided in this chapter. The responsibility for compensation and payment of medical, nursing, and hospital services and medicines, and funeral expenses provided under this chapter shall be on the employer and its insurance carrier and not on the employee.

Utah Code Ann. §35-1-81

(1) In addition to the compensation provided for in this chapter the employer or the insurance carrier shall pay a reasonable sum for medical, nurse, and hospital services, for medicines, and for artificial means, appliances, and prostheses necessary to treat the injured employee.

Utah Code Ann. §63-46b-11 (1993)

(1) The presiding officer may enter an order of default against a party if:

(a) a party in an informal adjudicative proceeding fails to participate in the adjudicative proceeding;

(b) a party to a formal adjudicative proceeding fails to attend or participate in a properly scheduled hearing after receiving proper notice; or

(c) a respondent in a formal adjudicative proceeding fails to file a response under Section 63-46b-6.

(2) An order of default shall include a statement of the grounds for default and shall be mailed to all parties.

(3) (a) A defaulted party may seek to have the agency set aside the default order, and any order in the adjudicative proceeding issued subsequent to the default order, by following the procedures outlined in the Utah Rules of Civil Procedure.

(b) A motion to set aside a default and any subsequent order shall be made to the presiding officer.

(c) A defaulted party may seek agency review under Section 63-46b-12, or reconsideration under Section 63-46b-13, only on the decision of the presiding officer on the motion to set aside the default.

(4) (a) In an adjudicative proceeding begun by the agency, or in an adjudicative proceeding begun by a party that has other parties besides the party in default, the presiding officer shall, after issuing the order of default, conduct any further proceedings necessary to complete the adjudicative proceeding without the participation of the party in default and shall determine all issues in the adjudicative proceeding, including those affecting the defaulting party.

(b) In an adjudicative proceeding that has no parties other than the agency and the party in default, the presiding officer shall, after issuing the order of default, dismiss the proceeding.

Utah Code Ann. §63-46b-12(1)(a) (1993)

(1) (a) If a statute or the agency's rules permit parties to any adjudicative proceeding to seek review of

an order by the agency or by a superior agency, the aggrieved party may file a written request for review within 30 days after the issuance of the order with the person or entity designated for that purpose by the statute or rule.

Utah Code Ann. §63-46b-14(2)

(2) A party may seek judicial review only after exhausting all administrative remedies available, except that:

(a) a party seeking judicial review need not exhaust administrative remedies if this chapter or any other statute states that exhaustion is not required;

(b) the court may relieve a party seeking judicial review of the requirement to exhaust any or all administrative remedies if: (i) the

administrative remedies are inadequate; or

(ii) exhaustion of remedies would result in irreparable harm disproportionate to the public benefit derived from requiring exhaustion.

Utah Code Ann. §63-46b-16(4) (1993)

(4) The appellate court shall grant relief only if, on the basis of the agency's record, it determines that a person seeking judicial review has been substantially prejudiced by any of the following:

(a) the agency action, or the statute or rule on which the agency action is based, is unconstitutional on its face or as applied;

(b) the agency has acted beyond the jurisdiction conferred by any statute;

(c) the agency has not decided all of the issues requiring resolution;

(d) the agency has erroneously interpreted or applied the law;

(e) the agency has engaged in an unlawful procedure or decision-making process, or has failed to follow prescribed procedure;

(f) the persons taking the agency action were illegally constituted as a decision-making body or were subject to disqualification;

(g) the agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court;

(h) the agency action is:

(i) an abuse of the discretion delegated to the agency by statute;

(ii) contrary to a rule of the agency;

(iii) contrary to the agency's prior practice,



unless the agency justifies the inconsistency by giving facts and reasons that demonstrate a fair and rational basis for the inconsistency; or  
(iv) otherwise arbitrary or capricious.

## **RULES**

### Rule 55(c), Utah Rules of Civil Procedure

(c) For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

### Rule 60(b), Utah Rules of Civil Procedure

(b) On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) when, for any cause, the summons in an action has not been personally served upon the defendant as required by Rule 4(e) and the defendant has failed to appear in said action; (5) the judgment is void; (6) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (7) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), (3), or (4), not more than 3 months after the judgment, order, or proceeding was entered or taken. A motion under this Subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

### Workers' Compensation Rules--Utah Administrative Code R568-1-4.E.

When an employer or insurance carrier fails to file an answer within the 30 days provided above, the Commission

may enter a default against such employer or insurance carrier. The Commission may then set the matter for hearing, take evidence bearing on the claim, and enter an Order based on the evidence presented. Such defaults may be set aside by following the procedure outlined in the Utah Rules of Civil Procedure. Said default shall apply to the defendant employer or insurance carrier and shall not be construed to deprive the Employers' Reinsurance Fund or the Uninsured Employers' Fund of any appropriate defenses.

**NATURE OF THE CASE, PROCEEDINGS BEFORE THE COMMISSION  
AND STATEMENT OF FACTS**

This matter is before the Utah Court of Appeals pursuant to Pipe Specialty's Petition For Review of the Industrial Commission of Utah's final Order awarding workers' compensation benefits to Salvador Montoya.

On October 1, 1991, Mr. Montoya was injured in an industrial accident while employed by Pipe Specialty. (R. 0001) Mr. Montoya incurred medical expenses of \$935.25 for treatment of the injury. (R. 00082 to 00092) Also because of the injury, he was unable to work from October 1, 1991 until January 3, 1992. (R. 00092)

On October 22, 1991, Mr. Montoya filed an Application For Hearing under Utah's Workers' Compensation Act (Utah Code Ann. §35-1 et seq.) seeking a determination that Pipe Specialty was liable for payment of his medical expenses and temporary disability compensation arising from the accident. (R. 00001)

On January 30, 1992, the Commission's Adjudication Division notified Pipe Specialty in writing that it had received Mr. Montoya's Application For Hearing. (R. 00006) The Adjudication Division enclosed a copy of Mr. Montoya's Application For Hearing with its letter and instructed Pipe Specialty as follows:

You must file with the Commission a written Answer to said Application within thirty (30) days from the date of this letter. . . . Failure to file an Answer within thirty (30) days may result in an entry of your default and the Commission will proceed without further notice to you to enter an Order disposing of the Application.

The foregoing notice was mailed to Pipe Specialty at 4425 West 12600 South, Riverton, Utah 84065. (R. 00008) Pipe Specialty received the notice but did not file an Answer. (R. 00060-61)

On March 20, 1992, the ALJ entered Pipe Specialty's default. (R. 00010) A copy of the Default Order was mailed to Pipe Specialty that same day, at its correct address of record. (R. 00011)

The ALJ proceeded to adjudicate Mr. Montoya's claim and issue his Order awarding medical expenses, temporary compensation and attorney's fees to Mr. Montoya. (R. 000200) The Order also contained the following provision regarding appeal rights:

. . . Any Motion for Review of the foregoing shall be filed in writing within thirty (30) days of the date hereof, . . . and unless so filed, this Order shall be final and not subject to review or appeal.

The Order was mailed to Pipe Specialty at its correct address of record on October 19, 1993. (R.00020 to R.00023)

On November 19, 1992, Pipe Specialty's attorney filed a Motion For Review with the Commission. (R.00033) The Motion For Review asked the Commission to set aside the default entered against Pipe Specialty, to reopen Mr. Montoya's workers' compensation claim and remand the claim to the ALJ to allow Pipe Specialty to contest the claim. (R. 00033) As a basis for setting aside Pipe Specialty's default, the Motion For Review alleged that Mr. Montoya had told

officers of Pipe Specialty that he did not intend to pursue his workers' compensation claim, and for that reason Pipe Specialty had not filed an Answer. Pipe Specialty filed no supporting affidavits or other evidence in support of its Motion For Review. (R.00033 to 00034.)

On January 6, 1993, the Commission denied Pipe Specialty's Motion For Review. (R.00039, 00041) The Commission's Order was mailed directly to Pipe Specialty instead of its attorney. (R.00042) On April 12, 1993, Pipe Specialty's attorney filed a Request for Reconsideration with the Commission. (R.00044 and 00045) The Commission took no action on the Request, which was therefore deemed denied on May 3, 1993. (R.00052)

#### SUMMARY OF ARGUMENT

Because Pipe Specialty's Motion For Review was filed beyond the time limit established by Section 63-46b-12(1) of Utah's Administrative Procedures Act, the Commission had no jurisdiction to consider the Motion. Consequently, Pipe Specialty lost its right to any further administrative or judicial review. Although the Commission raises this issue for the first time in this brief, such issues of jurisdiction may be raised at any time in the proceeding.

If, despite Pipe Specialty's untimely Motion For Review, the Court concludes that it has jurisdiction in this matter, the Court should find that the Commission's refusal to set aside Pipe Specialty's default was reasonable and rational, for the following reasons: First, Pipe Specialty failed to follow the procedure for

seeking relief from default that is established by Utah Code Anno. §63-46b-11(3)(c), in conjunction with Rules 55(c) and 60(b), Utah Rules of Civil Procedure. Second, Pipe Specialty failed to establish sufficient cause to set aside its default.

Finally, the evidence of record supports the ALJ's decision, as affirmed by the Commission, that Mr. Montoya is entitled to medical expenses and temporary disability compensation.

#### ARGUMENT

##### POINT ONE

**BECAUSE PIPE SPECIALTY'S MOTION FOR REVIEW TO THE COMMISSION WAS UNTIMELY, THE COMMISSION AND THIS COURT HAVE NO JURISDICTION IN THIS MATTER.**

Mr. Montoya's claim for workers' compensation benefits and Pipe Specialty's defenses to that claim are subject to the requirements of Utah's Administrative Procedures Act. (Utah Code Ann. §63-46b-1 et seq., "UAPA" hereafter.)

Section 63-46b-12(1)(a) of UAPA allows a party aggrieved by an agency order 30 days to either file a request for review, or obtain an extension of the 30 day period by showing good cause for the extension. Maverik v. Industrial Commission, 860 P.2d 944 (Utah App. 1993). The filing requirement of §63-46b-12(1)(a) is jurisdictional. The Commission has no authority to consider an untimely motion for review. Maverik, *ibid*.

In this case, the ALJ's decision was signed, dated and therefore issued on October 19, 1991. Dusty's v. Tax Commission, 842 P.2d 868, 870 (Utah 1992). Pipe Specialty filed its Motion For

Review on November 19, 1991, 31 days later, by hand delivery to the Commission.

Because Pipe Specialty's Motion For Review was filed beyond the 30 day period allowed by §63-46b-12(1)(a) of UAPA, the Commission lacked jurisdiction to consider the Motion's merits. Maverik v. Industrial Commission, 860 P.2d at 950.

The Commission's Order erred in finding that Pipe Specialty's Motion For Review had been timely filed. Because of that error, the Commission dismissed the Motion on its merits, rather than for lack of jurisdiction. Despite the Commission's failure to note its lack of jurisdiction, the jurisdictional defect may be raised at any stage in the proceeding, and cannot be waived by the parties or the Court. Silva v. Department of Employment Security, 786 P.2d 246, 247 (Utah App. 1990).

Not only did Pipe Specialty's untimely Motion For Review deprive the Commission of jurisdiction, it likewise deprives this Court of jurisdiction. This is so because by failing to file a timely Motion For Review with the Commission, Pipe Specialty failed to exhaust its administrative remedies. Exhaustion of administrative remedies is required as a prerequisite to judicial review. Section 63-46b-14(2) of UAPA provides: "A party may seek judicial review only after exhausting all administrative remedies; . . . (subject to exceptions not material here)." Pipe Specialty's failure to exhaust its administrative remedies therefore deprives the Court of subject matter jurisdiction. Maverick v. Industrial Commission, 860 P.2d at 547, 548.

In summary, because Pipe Specialty failed to file a timely Motion For Review, the ALJ's Order became final on November 18, 1991. After that date, the Order was no longer subject to review by the Commission, or appellate review by this Court.

#### POINT TWO

#### **THE COMMISSION'S REFUSAL TO SET ASIDE PIPE SPECIALTY'S DEFAULT WAS REASONABLE AND RATIONAL AND SHOULD BE AFFIRMED.**

Even if the Court has jurisdiction to consider the merits of Pipe Specialty's Petition For Review, the Court should affirm the Commission's rejection of Pipe Specialty's request for relief from default.

As an initial point, Pipe Specialty did not comply with the procedure established by law and rule for requesting relief from default. Section 63-46b-11((3)(c) of UAPA provides: "A motion to set aside a default and any subsequent order shall be made to the presiding officer." (Emphasis added.)

UAPA's requirement that requests for relief from default be presented to the presiding officer was a considered decision of the drafters of UAPA:

The intent of Section 46b-11(3) is that the presiding officer initially decides whether a default should be set aside . . . . (Comments of the Utah Administrative Law Advisory Committee on the Drafting and Interpretation of the Utah Administrative Procedures Act, Code Co. Law Publishers, 1988.)

The requirement that the presiding officer decide whether relief from default is warranted in light of the presiding officer's knowledge of the case. In keeping with UAPA's requirement that the presiding officer decide whether relief from

default is proper, Section 63-46b-11(3)(c) of UAPA limits the Commission's involvement to a purely review function:

A defaulted party may seek agency review under Section 63-46b-12, or reconsideration under Section 63-46b-13, only on the decision of the presiding officer on the motion to set aside the default.

If Pipe Specialties had complied with the foregoing requirement of UAPA, it would have had the opportunity to present all its evidence and argument in support of relief from default. The ALJ's ruling could then have been reviewed by the Commission with the benefit of a complete record.

Pipe Specialties' failure to follow the foregoing procedure has limited the evidence which is now available not just from Pipe Specialties, but also from Mr. Montoya. Having chosen to frame the default issue in this way, Pipe Specialty must abide by the consequences of its choice. The Commission's denial of Pipe Specialty's request for relief from default should be affirmed.

Aside from Pipe Specialty's failure to follow procedures for seeking relief from default, Pipe Specialty has also failed to provide evidence that it is entitled to relief from default.

Under §11(3) of UAPA, default may be set aside under the provisions of Rules 55(c) and 60(b) of the Utah Rules of Civil Procedure. Taken together, Rules 55(c) and Rule 60(b), as pertinent to this case, allow relief from default for mistake, inadvertence, surprise, excusable neglect, or misrepresentation or other misconduct of an adverse party.

Pipe Specialty argues that an alleged misrepresentation by Mr. Montoya caused it to refrain from filing its Answer to Mr.



Montoya's Application For Hearing. However, the record in this matter contains no competent evidence whatsoever of any such misrepresentation. The alleged misrepresentation was raised for the first time in Pipe Specialty's Motion For Review, but with no supporting evidence. Later, after this matter was before the Court and as part of the briefing, Pipe Specialty attempted to submit an affidavit regarding the alleged misrepresentation.

There are ways to place evidence of an opposing party's misconduct into the record. The evidence could have been presented to the presiding officer if Pipe Specialty had followed proper procedure. In that case, Mr. Montoya would have had an opportunity to respond. Even at the late date of these proceedings, Pipe Specialty could have attempted to augment the record before the Court. Whether such an effort would have been successful is problematic. Olson v. Park-Craig-Olson, Inc., 815 P.2d 1356, 1359 (Utah App. 1991). However, because Pipe Specialties has taken neither of the foregoing steps, its proffered affidavit must be disregarded by the Court. Olson v. Park-Craig-Olson, Inc., *ibid.* Absent that affidavit, there is no evidence to support allegations of misrepresentation or misconduct by Mr. Montoya.

Pipe Specialty also contends that it did not receive notice that default had been entered against it. The Commission has addressed this point in its Order Denying Motion For Review and has simply found it unworthy of belief. The record establishes that all documents, including the Default Order, were mailed to the proper address. No documents were returned to the Commission as

undelivered. Pipe Specialty concedes that it received some documents at the given address. Based on the foregoing, the evidence supports the Commission's conclusion that Pipe Specialty received all required notices and orders and had ample opportunity to protect its interests in this matter.

In summary, Pipe Specialty failed to properly request relief from default in this matter and has failed to properly submit any competent evidence in support of its request for relief from default. The Commission's decision affirming the ALJ's decision and refusing to set aside Pipe Specialty's default is reasonable and rational and supported by the available evidence properly before this Court.

### POINT III

#### **THE RECORD SUPPORTS THE COMMISSION'S AWARD OF MEDICAL EXPENSES AND TEMPORARY DISABILITY COMPENSATION TO MR. MONTOYA.**

The initial decision of the ALJ, as later affirmed by the Commission, awarded temporary total disability benefits and medical expenses to Mr. Montoya. Pipe Specialty argues that the evidence before the ALJ and Commission is insufficient to support such an award.

A party attacking the Commission's findings of fact on appeal must marshall all the evidence available in the record, including the evidence that supports the party's attack, but also any evidence that supports the Commission's decision. King v. Industrial Commission of Utah, 850 P.2d 1281 (Utah App. 1993).

Pipe Specialty has failed to comply with this requirements of marshalling the evidence.

When the available evidence is examined, it uniformly supports the Commission's decision. The facts of Mr. Montoya's employment by Pipe Specialty, the nature of his accident and the resulting injury, the amount of his medical expenses and the period of his inability to work are all substantiated in the record. The Commission is unaware of any contrary evidence that contradicts any part of the Commission's Order. The Commission's findings are, therefore, clearly supported by substantial evidence and should be affirmed.

#### CONCLUSION

In summary, the Commission contends that Pipe Specialty's Petition For Review should be dismissed, either on jurisdictional grounds or on its merits.

DATED this 28th day of March, 1994.

By \_\_\_\_\_  
Alan Hennebold, General Counsel  
Industrial Commission of Utah

**CERTIFICATE OF SERVICE**

I hereby certify that I caused 2 true and correct copies of BRIEF OF RESPONDENT INDUSTRIAL COMMISSION OF UTAH to be served upon Petitioner Pipe Specialty Inc. by causing to be placed in an envelope addressed to the following:

James J. Lund  
Attorney at Law  
2304 S. Berkeley Street  
Salt Lake City, Utah 84109

and said envelope was then deposited, sealed, with first class postage prepaid thereon, in the United States mail at Salt Lake City, Utah, on the 28th day of March, 1994.

---

Alan Hennebold  
General Counsel  
Industrial Commission of Utah

**ADDENDUM**

**APPLICATION FOR HEARING**

**Industrial Commission of Utah**  
**Industrial Accidents Division**  
**160 East 300 South - P.O. Box 510250**  
**S.L.C., UT 84151-0250**

NOTE: PLEASE TYPE OR PRINT IN BLACK INK

WCF

The Industrial Commission has the following documents on file:	
Medical	<input type="checkbox"/>
Employer Report	<input type="checkbox"/>
First Payment Report	<input type="checkbox"/>
Copies of the above documents will be provided upon request	

SALVADOR D MONTGUA \*

Applicant (Employee) \*

Maiden Name and/or Other Name(s) Used \*

PIPE SPECIALTY INC \*

Employer \*

12600 \*

1425 W 12400 S RIVERTON, UTAH \*

Employer's Street Address \*

R Policy # Z00236 \*

Employer's Insurance Carrier \*

**APPLICATION FOR HEARING**

APPLICANT ALLEGES AND REQUESTS RESOLUTION CONCERNING THE FOLLOWING UNDER TITLE 35:

1. I sustained an injury by accident arising out of and in the course of employment with Defendant (employer) on the 1 day of OCTOBER, 1991, at the following location: (Give name & complete address or nearest junction, mile marker, etc.) US Hwy 89 west to IDAHO FALLS IN PATELL  
ACROSS FMC PLANT
2. The accident occurred as follows: (Describe accident and resulting injuries (Body part(s) injured) FITTING 40' X 26'  
PIPE IN PIT, WELD BROKE ON FITTING JIG, PIPE CAME DOWN ON FOOT AND BROKE  
THE UPPER PART OF BIG TOE ON TWO DIFFERENT PLACES
3. The injury caused temporary total disability from 10/2/91 to UNDER DR. CARE  
Date first off Date returned
4. I have received compensation as follows: (Indicate the last paid amounts you received (weekly or monthly) and the last payment date.) NONE

5. This Claim is filed because: (Please mark an X in the appropriate space(s))

- A. ☒ Unpaid Medical Expenses  
 B. ☐ Recommended Medical Care  
 C. ☐ Temporary Total Compensation  
 D. ☐ Temporary Partial Compensation  
 E. ☐ Permanent Partial Compensation

- F. ☐ Permanent Total Compensation  
 G. ☐ Travel Expenses  
 H. ☐ Interest

I. ☒ Other (specify) IM NOT GETTING  
PAID FOR MY TIME OFF WORK.

6. IN ADDITION, THE CLAIMANT ALLEGES: (Please fill in or mark appropriate blank)

My date of birth is 6/5/60. At the time of injury my wage was \$ 11.<sup>00</sup> (per hour) day;  
 week; month; or other (if other, specify method of payment) and I was working 50 TO 60 hours per week.

I M was /    was not married and had 1 children under age 18 dependent on me for support.

Date 10/22/91

SALVADOR D. MONTGUA  
 Printed Name of Applicant

Printed Name of Attorney

Salvador D. Montguya  
 Signature of Applicant

Signature of Attorney

4362 Hwy 28 South  
 Street Address of Applicant

Street Address &amp; Office # of Attorney

LAS CRUCES NM 88005  
 City / State / Zip of Applicant

City / State / Zip / Telephone

(505) 526 3285 / 1585-92-3802  
 Applicant's Telephone Social Security #

**UNSIGNED OR INCOMPLETE FORMS WILL BE RETURNED**  
**SIGNATURES CERTIFY READING OF INSTRUCTIONS ON REVERSE SIDE OF THIS FORM**

**ADDENDUM**

**NOTICE OF APPLICATION**



Norman H Bangerter  
Governor

Timothy C Allen  
Presiding Administrative Law Judge

# State of Utah

## INDUSTRIAL COMMISSION OF UTAH

### ADJUDICATION DIVISION

160 East 300 South  
P O Box 510250  
Salt Lake City Utah 84151 0250  
(801) 530 6800  
(801) 530 6804 (Fax)

Stephen M Hadley  
Chairman  
Thomas R Carlson  
Commissioner  
Dixie L Minson  
Commissioner

January 30, 1992

#### CERTIFIED MAIL - RETURN RECEIPT REQUESTED

KIM MARGETTS  
PIPE SPECIALTY INC  
4425 WEST 12600 SOUTH  
RIVERTON UT 84065

Re: Salvador D Montoya  
Inj: 10-01-91  
Emp: Pipe Specialty  
(UNINSURED)

Gentlemen:

We are enclosing a copy of the above named employee's Application for Hearing which has been filed with the Commission.

You must file with the Commission a written Answer to said Application within thirty (30) days from the date of this letter. Said Answer may be in letter form, but should either admit or deny liability for the claim. It should either admit, deny, or specifically respond to every paragraph of the application form. You must set forth any affirmative defenses you may have or you may be precluded from raising such defenses at any hearing on the claim. Failure to file an Answer within thirty (30) days may result in an entry of your default and the Commission will proceed without further notice to you to enter an Order disposing of the Application.

BY DIRECTION:

INDUSTRIAL COMMISSION OF UTAH

By Marjorie Mele  
Marjorie Mele, Clerk  
Adjudication Division  
6851

ay 28 South, Las Cruces NM  
S, Riverton UT 84065  
insured Employers Fund

P 544 878 605

RECEIPT FOR CERTIFIED MAIL  
NO INSURANCE COVERAGE PROVIDED  
NOT FOR INTERNATIONAL MAIL  
(See Reverse)

Sent to	PIPE SPECIALTY INC
Street and No	4425 WEST 12600 SOUTH
P O State and ZIP Code	RIVERTON UT 84065
Postage	
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt showing to whom and Date Delivered	
Return Receipt showing to whom Date and Address of Delivery	
TOTAL Postage and Fees	\$
Postmark or Date	
Salvador Montoya	

\*US GPO 1989-234 555

PS Form 3800, June 1985

80000



**ADDENDUM**

**DEFAULT ORDER**

## INDUSTRIAL COMMISSION OF UTAH

Case No. 91001181

SALVADOR D MONTOYA,

Applicant,

v.

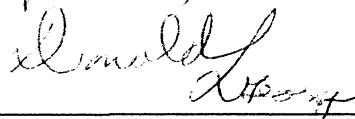
PIPE SPECIALTY  
(UNINSURED),

Defendants.

\*  
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\*

DEFAULT ORDER

An Application for Hearing having been filed with the Commission in this case on October 24, 1991; and the Commission having transmitted a copy of said Application to the defendants, Pipe Specialty, on January 30, 1992, advising defendants to file an Answer to said Application within thirty (30) days from date of mailing of said Application or suffer default to enter, and have the Commission proceed without further notice to said defendant; and defendants having failed to file an Answer, said default is hereby entered this 20th day of March, 1992




---

Donald L George  
Administrative Law Judge

Certified this 20th day of  
March 1992.

ATTEST:

/s/ Patricia Ashby

---

Patricia Ashby  
Commission Secretary

02, 10

1930

Cynthia A Anderson, Atty, Uninsured Employers Fund

Mary Ann Reed

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**ADDENDUM**

**ALJ'S ORDER**

Reviewed  
JAS  
7/19/92.

THE INDUSTRIAL COMMISSION OF UTAH

Case No. 91-1181

SALVADOR D. MONTOYA,

Applicant,

vs.

PIPE SPECIALTIES, INC.  
(uninsured).

Defendant.

\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*

FINDINGS OF FACT  
CONCLUSIONS OF LAW  
AND ORDER

Judge Donald L. George

\* \* \* \* \*

This matter came on for hearing before the Honorable Donald L. George, one of the Administrative Law Judges of the Industrial Commission of Utah on October 15, 1992 on the application of Salvador Montoya for an award of temporary total compensation and payment of medical expenses incurred as the result of an industrial accident. The applicant was present by telephone from his home in New Mexico. The default of the defendant, Pipe Specialties, Inc., was issued on March 20, 1992 for failure to respond to the application within the time required by the rules of the Industrial Commission of Utah. The Uninsured Employers' Fund appeared through its counsel, Thomas C. Sturdy. The applicant testified on his behalf and the medical records pertinent to Mr. Montoya's injuries were admitted in evidence. Based upon that testimony and evidence, the Industrial Commission of Utah now makes the following:

FINDINGS OF FACT

On October 1, 1991, while pursuing the business of his employer, defendant Pipe Specialties, Inc., a Utah corporation, the applicant suffered an industrial accident when a jig holding a large section of pipe broke and dropped the pipe on Mr. Montoya's foot, fracturing the proximal phalanx of the left great toe. The accident occurred near Pocatello, Idaho. Mr. Montoya had worked for Pipe Specialties within the State of Utah within the previous six months.

The Bannock Memorial Medical Center, Pocatello, Idaho, and Alan C. Davis, M.D., Las Cruces, New Mexico, treated Mr. Montoya's injury. The medical bills are: \$432.25 owing to the Bannock Regional Medical Center and \$503.00 owing to Dr. Davis.

At the time of the accident, Mr. Montoya was working an average of 55 hours per week and earning \$11.00 per hour. He was married and had one child who was dependent on him for support.

Mr. Montoya was totally disabled from the day of the acci-

dent until Dr. Davis released him to return to work on January 3, 1992.

Pipe Specialties, Inc. had no worker's compensation insurance at the time of Mr. Montoya's accident.

#### CONCLUSIONS OF LAW

The applicant sustained a compensable industrial accident on October 1, 1992, while employed by defendant Pipe Specialties, Inc., when a large section of pipe dropped on his foot and fractured the proximal phalanx of the left great toe.

The defendant is liable for Applicant's medical expenses reasonably related to the industrial injury.

The applicant is entitled to temporary total disability compensation benefits for the period from October 2, 1991 to January 3, 1992 when he was released to return to work by his treating physician.

#### ORDER

IT IS HEREBY ORDERED that Pipe Specialties, Inc. shall pay all medical expenses incurred by the applicant as the result of the industrial accident including, but not limited to, \$432.25 owing to the Bannock Regional Medical Center, and \$503.00 owing to Dr. Alan C. Davis.

IT IS FURTHER ORDERED that defendant Pipe Specialties, Inc., pay to Salvador Montoya temporary total compensation at the rate of \$378.00 per week for 13.4286 weeks for a total of \$5,706.01 for temporary total disability from October 2, 1991 through January 3, 1992. These benefits are accrued and shall be paid in a lump sum with interest of 8% per annum commencing January 3, 1992.

IT IS FURTHER ORDERED that the applicant shall be entitled to recover all attorneys fees and costs incurred in collecting this award from Pipe Specialties, Inc., pursuant to UCA §35-1-59.

IT IS FURTHER ORDERED that if Pipe Specialties, Inc., becomes or is insolvent, appoints or has appointed a receiver, or otherwise does not have sufficient funds, insurance, sureties, or other security to pay the amounts required to be paid by this Order, the compensation and benefits shall be paid by the Uninsured Employers' Fund in accordance with the Medical and Surgical Fee Schedule of the Commission. In the event of payment by the Uninsured Employers' Fund, it shall be subrogated to all of the rights of the applicant to collect the sums due and owing by Pipe Specialties, Inc., pursuant to UCA §35-1-107.

IT IS FURTHER ORDERED that any Motion for Review of the foregoing shall be filed in writing within thirty (30) days of

the date hereof, specifying in detail the particular errors and objections, and, unless so filed, this Order shall be final and not subject to review or appeal.

INDUSTRIAL COMMISSION OF UTAH

*Donald L. George*

*George*

Donald L. George  
Administrative Law Judge

Certified by the Industrial Commission  
of Utah, Salt Lake City, Utah, this

19th day of October, 1992.

ATTEST:

*Patricia O. Ashby*  
Patricia O. Ashby  
Commission Secretary



CERTIFICATE OF MAILING

I certify that on the 19<sup>th</sup> day of October, 1992, I mailed a true and correct copy of the foregoing findings of fact, conclusions of law and order by depositing the same in the United States mail, postage prepaid, addressed to:

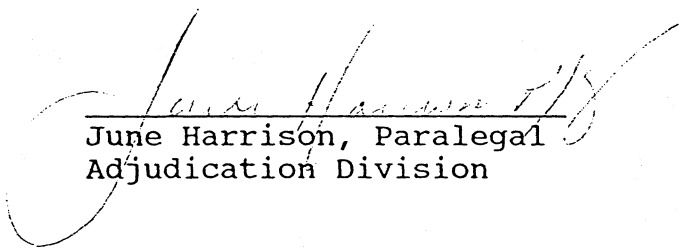
Salvador D. Montoya  
4362 Highway 28 South  
Las Cruces, NM 84065

Pipe Specialties, Inc.  
4425 West 12600 South  
Riverton, UT 84065

Joyce A. Sewell, Administrator  
Uninsured Employers' Fund  
160 East 300 South, 3rd Floor  
P.O. Box 146612  
Salt Lake City, UT 84114-6612

Thomas C. Sturdy  
160 East 300 South, 3rd Floor  
P.O. Box 146612  
Salt Lake City, UT 84114-6612

INDUSTRIAL COMMISSION OF UTAH

  
June Harrison, Paralegal  
Adjudication Division

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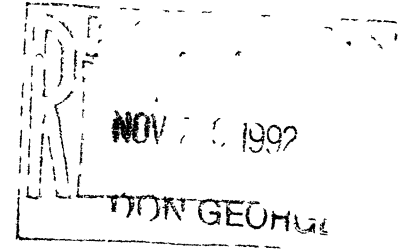
**ADDENDUM**

**MOTION FOR REVIEW**

James J. Lund 5751  
Attorney for Defendant  
10 West 100 South #710  
Salt Lake City, Utah 84101  
Telephone: (801) 575-8311

RECORDED

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## THE INDUSTRIAL COMMISSION OF UTAH

Salvador D. Montoya  
Applicant

MOTION FOR REVIEW

v.

Pipe Specialties, Inc.,  
Defendant

Judge Donald George

Defendant moves the Commission, pursuant to Commission Rules and Utah Code Ann. Section 35-1-82.52 (1988 Repl. Vol. \_\_\_\_ ) to review its Findings of Fact, Conclusions of Law, and Order entered on the 19th day of October 1992. The basis for Defendant's motion for Review is as follows:

1. Applicant is currently and has been in the employ of Defendant subsequent to the alleged accident date.
2. While in the employ of Defendant, Applicant told Defendant he no longer wished to pursue a claim against Defendant.
3. Based on such representations, Defendant did not respond, to Claimant's Application, by filing on answer.
4. Further, Defendant received Notice of Cancellation of Hearing from the Commission dated April 2, 1992.
5. Thereafter, Defendant received no further notice from either the Commission or Applicant that any action was still pending against it.
6. Under such understanding Defendant did not apprise the undersigned of any action pending.


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THE INDUSTRIAL COMMISSION  
OF UTAH  
Page Two

7. The undersigned has been active in representing Defendant in various legal matters including a separate matter before the Commission involving Mr. Lester Hunt as applicant.
8. As counsel for Defendant the undersigned has never received any notice concerning Applicant's application.

Based on the foregoing Defendant seeks a Hearing and Review on the merits of Applicant's Application and a reasonable and fair opportunity to consider the evidence put forth by Applicant in Support of the award entered by way at Order by the Commission on October 19, 1992.

DATED this 19th day of November, 1992

  
James J. Lund  
Attorney for Defendant

**ADDENDUM**

**ORDER DENYING MOTION FOR REVIEW**

THE INDUSTRIAL COMMISSION OF UTAH  
Case Number 91001181

Salvador D. Montoya, 10-1-91	*	
	*	
Applicant,	*	
vs.	*	ORDER DENYING
585-92-3802	*	MOTION FOR
Pipe Specialties, Inc.	*	REVIEW
(uninsured),	*	
	*	
Respondent.	*	
*****		

The Industrial Commission of Utah ("commission") issues this order pursuant to Utah Code Annotated, Section 35-1-78 and Section 63-46b-12.

On November 19, 1992, Pipe Specialties, Inc. ("respondent") timely filed a motion for review of the Findings of Fact Conclusions of Law and Order entered by an administrative law judge ("ALJ") of the commission in the above captioned matter on October 19, 1992.

The respondent requests that the commission grant a hearing and review the merits of the applicant's claim. The respondent's request is based upon its claim that it received no notice of the pending action following the Notice of Cancellation of Hearing dated April 2, 1992.

Review of the record in this matter shows that the respondent received notice of the following: (1) Application for Hearing by certified letter dated January 30, 1992; (2) Notice of Hearing dated March 19, 1992; (3) Default Order for failure of respondents to file an answer to the application for hearing dated March 20, 1992; (4) Interrogatories to Applicant dated March 31, 1992; (5) Notice of Cancellation of Hearing dated April 2, 1992; (6) Notice of Hearing on October 16, 1992 dated July 20, 1992; (7) Findings of Fact Conclusions of Law and Order dated October 19, 1992; (8) Abstract of Award dated October 19, 1992; (9) Supplemental Order Awarding Attorneys Fees dated November 4, 1992; and (10) Abstract of Award dated November 4, 1992.

The file contains no notice that Mr. Lund was representing the respondent in this matter. All notices described above were mailed to the respondent at its address in Riverton, Utah and none were returned. It is unreasonable for the respondent to assert that notice should have been sent to his attorney when no notice of representation had been filed with the commission. We believe that the respondent had ample notice and opportunity to appear or file pleadings in this matter.

The respondent further claims that the applicant made representations that he no longer wished to pursue his claim

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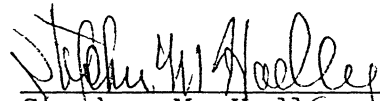
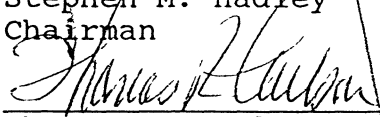

A party claiming an estoppel cannot rely on representations or acts if they are contrary to his own knowledge of the truth or if he had the means by which with reasonable diligence he could ascertain the true situation. Coombs v. Ouzounian, 24 Utah 2d 39, 465 P.2d 356 (1970); see also Cook v. Cook, 110 Utah 406, 174 P.2d 434 (1946). Furthermore, a determination of the issue of estoppel is not dependent on the subjective state of mind of the person claiming he was misled, but rather is to be based on an objective test, i.e., what would a reasonable person conclude under the circumstances. Big Butte Ranch, Inc. v. Holm, Utah, 570 P.2d 690 (1977); Corporation Nine v. Taylor, 30 Utah 2d 47, 513 P.2d 417 (1973).

ORDER:

1 "[T]he Industrial Commission remains a statutorily-created agency, not a court of equity. As such, the Industrial Commission has only those powers expressly or impliedly granted to it by the legislature." Bevans v. Industrial Commission, 790 P.2d 573, 576 (1990); Utah Copper Co. v. Industrial Comm'n, 57 Utah 118, 193 P. 24, 26 (1920).

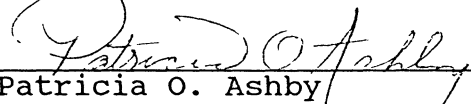
Salvador D. Montoya  
Order  
Page three

IT IS FURTHER ORDERED that any appeal shall be to the Utah Court of Appeals within 30 days of the date of the Order, pursuant to Utah Code Annotated, Sections 35-1-82.53(2), 35-1-86, and 63-46b-16, and Bonded Bicycle Couriers v. Dept. of Employment Security, Case No. 920621-CA (Utah Ct. App. Dec. 4, 1992). The requesting party shall bear all costs to prepare a transcript of the hearing for appeals purposes.

  
\_\_\_\_\_  
Stephen M. Hadley  
Chairman  
  
\_\_\_\_\_  
Thomas R. Carlson  
Commissioner  
  
\_\_\_\_\_  
Colleen S. Colton  
Commissioner

Certified this 6th day of January 1993.

ATTEST:

  
\_\_\_\_\_  
Patricia O. Ashby  
Commission Secretary



CERTIFICATE OF MAILING

I hereby certify that on the 1<sup>st</sup> day of January, 1993, the attached ORDER DENYING MOTION FOR REVIEW in the case of Salvador Montoya was mailed, postage pre-paid to the following persons at the following addresses:

Salvador Montoya  
4362 Highway 28 So  
Las Cruces, NM 84065

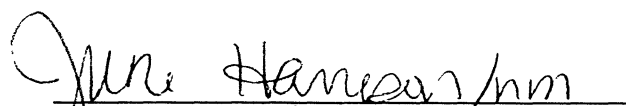
Pipe Specialties, Inc  
4425 W 12600 S  
Riverton UT 84065

Joyce Sewell, Administrator  
UEF

Thomas C. Sturdy, Atty  
UEF

Judge Donald L. George

INDUSTRIAL COMMISSION OF UTAH

  
June S. Harrison, Paralegal  
Adjudication Division

/jsh  
Cert\Montoya



**ADDENDUM**

**MOTION FOR RECONSIDERATION**

RECEIVED  
APR 13 1993  
GENERAL COUNSEL

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JAMES J. LUND #5751  
Suite 710 Crandall Building  
10 West 100 South  
Salt Lake City, Utah 84104  
Telephone: (801) 575-8311  
Facsimile: (801) 575-8340

Attorney for Defendant

BEFORE THE INDUSTRIAL COMMISSION OF UTAH  
ADJUDICATION DIVISION

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SALVADOR MONTOYA, an individual,	:	
	:	
Plaintiff	:	MOTION FOR RECONSIDERATION
	:	
v.	:	
	:	
PIPE SPECIALTY, INC.,	:	Case No.
a Utah Corporation,	:	
	:	
Defendant.	:	
	:	

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Defendant, Pipe Specialty, by and through its counsel, James J. Lund, hereby moves the Division to reconsider the Division's Order denying review previously sought by Defendant's Motion for Review. The basis for this Motion for Reconsideration is as follows:

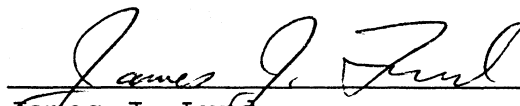
1. By Defendant's previously filed Motion for Review on or about November 19 of 1992, the Division was apprised of the undersigned's representation of Defendant.

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2. The Division, through denying Defendant's Motion for Review, failed to give notice to the undersigned because it omitted the undersigned's name and address to the mailing or service certificate that accompanied the Division's Order dated January 6, 1993 denying the Defendant's Motion for Review.
3. In subsequent communication with General Counsel for the Industrial Commission, in March of 1993 the undersigned had confirmed to him the fact that improper or inadequate notice of the Division's Order denying the Defendant's Motion for Review had been given.
4. Because of the inadequate and/or improper and untimely notice Defendant's appeal rights from the Division's Order denying the Defendant's Motion for Review were obviated.
5. The appeal time frame began running from the date of the Division's Order or January 6, 1993.
6. Defendant and its officers, being out of town on work was not apprised of the Division's Order denying Defendant's Motion for Review and therefore could not timely notify the undersigned of any action by the Division.

On the basis of the foregoing, Defendant, by and through the counsel of record, James J. Lund, hereby respectfully submits this Motion for Reconsideration.

DATED this 8th day of April, 1993.

  
James J. Lund  
Attorney for Defendant